



December 4, 2001

Ms. Linda Cloud
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2001-5616

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155639.

In regard to a complaint alleging a violation of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, the Texas Lottery Commission (the "commission") received a request for the identity of the complainant, what the complaint pertains to, and what location the complaint is about. You have submitted for our review a document containing the information responsive to the request. You assert that the information you have marked in this document is excepted from disclosure under section 552.101 of the Government Code. The commission also notified the complainant of the request by correspondence dated October 1, 2001. *See* Gov't Code § 552.305. In response, the complainant submitted comments to this office arguing against the release of information that would identify the complainant. We have considered the submitted arguments and assertions, and we have reviewed the submitted information.

We must first address a procedural matter. You represent that the commission received the request on August 27, 2001. However, the commission did not request a decision from this office until correspondence received by the office on September 28, 2001. Section 552.301(b) of the Government Code requires that a governmental body request a decision from this office and state the exceptions that apply no later than the tenth business day after its receipt of the information request. *See also* Gov't Code § 552.301(d) (ten business day deadline to notify requestor); *id.* § 552.301(e) (fifteen business day deadline to

submit additional information to attorney general). You acknowledge that the commission did not timely request a decision in accordance with the requirements of section 552.301. If a governmental body does not comply with section 552.301, section 552.302 provides that the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Accordingly, we next address whether a compelling reason under section 552.302 has been demonstrated for withholding the information at issue.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." We understand you to assert this exception in conjunction with the informer's privilege, and in conjunction with the complainant's right to privacy. We first address the assertion of the informer's privilege.

The informer's privilege, incorporated into the Public Information Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). This office has held that it protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The United States Supreme Court explained the rationale underlying this privilege in *Roviaro v. United States*, 353 U.S. 53, 59 (1957):

What is usually referred to as the informer's privilege *is in reality the Government's privilege* to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. (Citations omitted, emphasis added).

Thus, the informer's privilege is held by the governmental body and serves its interests by protecting the flow of information to it. Accordingly, unlike other information protected by section 552.101, a governmental body is free to waive the informer's privilege and release

information for which it otherwise could claim the exception. Open Records Decision No. 549 at 6 (1990). As the commission is not prohibited from disclosing the information at issue by virtue of the informer's privilege, this assertion does not demonstrate a compelling reason to withhold the information sufficient to overcome the presumption of openness created by the commission's non-compliance with section 552.301. We therefore conclude that in this instance, the information may not be withheld under section 552.101 in conjunction with the informer's privilege.

We also understand the commission and the complainant to assert a privacy interest in the information. Section 552.101 also incorporates the common law right to privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In this instance, however, the information does not meet the first prong of this test, and therefore it is not protected under the common law right to privacy.

The comments submitted by the complainant express fear of retaliation or harassment were the complainant's identity released. This office has held that information may be protected under section 552.101 in conjunction with an individual's right to privacy in instances of "special circumstances." *See* Open Records Decision No. 169 (1977). We have held that such special circumstances are demonstrated where release of the information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6 (1997). However, such special circumstances do not include "a generalized and speculative fear of harassment or retribution." *Id.* Having carefully considered the submitted arguments and assertions, we do not believe that special circumstances have been demonstrated in this instance.¹ We therefore conclude that the information may not be withheld under section 552.101 in conjunction with the complainant's right to privacy.

Finally, we note that the information includes a social security number. A social security number is excepted from required public disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security number in this instance is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, the commission

¹However, in response to the complainant's concerns, we note that were the complainant subject to any form of retaliation due to the complaint, there would exist a cause of action under the ADA, which prohibits such retaliation. *See* 42 U.S.C §12203.

should ensure that it was not obtained nor is it maintained by the commission pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, except for the social security number, which may be subject to required withholding as explained above, the requested information must be released pursuant to section 552.302 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

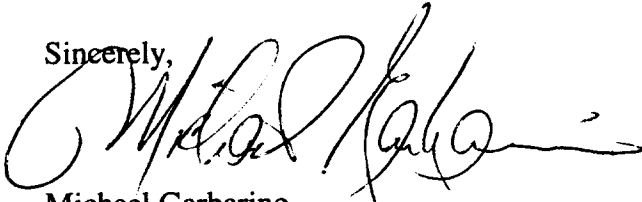
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 155639

Enc. Submitted documents

c: Mr. E. H. Steinhagen, III
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(w/o enclosures)